



**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

INTELLISPHERE, LLC.

CASE NO. 10-cv-1482

**Plaintiff:**

## SAN DIEGO MD MAGAZINE; EVEON C. JOZWIAK

**ORDER DENYING MOTION FOR  
DEFAULT JUDGMENT AND  
MOTION FOR ATTORNEY'S FEES**

[Docket Nos. 9, 10]

## Defendants

Currently before the Court is Plaintiff's Motion for Default Judgment (Docket No. 9) and related Motion for Attorney's Fees (Docket No. 10). For the reasons set forth herein, the motions are **DENIED**.

## BACKGROUND

This action is based on alleged trademark infringement. According to the Complaint, Plaintiff owns the trademark "MD Magazine" and Defendants used this trademark in their on-line and written publication without Plaintiff's permission.

On October 2, 2010, Plaintiff served Defendants with a Complaint alleging trademark infringement, unfair competition and deceptive trade practices. (Docket Nos. 4, 5.) Defendants did not file an answer or other response to the Complaint. Accordingly, on November 16, 2010, the Clerk entered a default against them. (Docket No. 7.)

On December 31, 2010, Plaintiff filed the motions currently before the Court. (Docket Nos.

1 9, 10.) Defendants filed an opposition, and Plaintiff filed a reply. (Docket Nos. 14, 15.)

2 **MOTION FOR DEFAULT JUDGMENT**

3 It is well-established that courts are reluctant to grant default judgments due to the public  
 4 policy favoring trial on the merits. *Eitel v. McCool*, 782 F.2d 1470, 1472 (9th Cir. 1986). Factors  
 5 relevant to determining whether a default judgment should be entered include: “(1) the possibility of  
 6 prejudice to the plaintiff; (2) the merits of plaintiff’s substantive claim; (3) the sufficiency of the  
 7 complaint; (4) the sum of money at stake in the action; (5) the possibility of a dispute concerning  
 8 material facts; (6) whether the default was due to excusable neglect; and (7) the strong policy  
 9 underlying the Federal Rules of Civil Procedure favoring decisions on the merits.” *Id.* at 1471-72.

10 Applying those factors here, the Court first notes that the alleged infringement is somewhat  
 11 narrow in scope and the Complaint was served only six months ago. Therefore, Plaintiff would not  
 12 be prejudiced absent a default judgment. The Court further notes that Plaintiff seeks over \$150,000  
 13 in damages and Defendants dispute that their business infringes on Plaintiff’s alleged trademark.  
 14 Therefore, the sum of money at stake and the possibility of a dispute concerning material facts support  
 15 the denial of Plaintiff’s motion. Lastly, Defendants’ failure to file an answer appears to have been  
 16 excusable neglect. The record shows that the parties were engaged in settlement negotiations and  
 17 Defendants were relying on erroneous advice from a non-attorney. Defendants tried to retain counsel,  
 18 but without success. Additionally, Defendant Jozwiak had health problems that prevented him from  
 19 more diligently defending against Plaintiff’s claims. In light of these factors that weigh against default  
 20 judgment, the Court does not address the merits of Plaintiff’s substantive claims or the sufficiency of  
 21 the complaint.

22 Plaintiff’s Motion for Default Judgment is **DENIED**. Defendants shall have until and  
 23 including May 23, 2011 to file an answer or other response to Plaintiff’s complaint. Defendants are  
 24 reminded that corporate defendants cannot represent themselves and must retain counsel. *Rowland*  
 25 *v. Cal. Men’s Colony*, 506 U.S. 194, 202 (1993) (“It has been the law for the better part of two  
 26 centuries ... that a corporation may appear in the federal courts only through licensed counsel . . .  
 27 [T]hat rule applies equally to all artificial entities.”); *see also* Civil Local Rule 83.3.

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## **MOTION FOR ATTORNEY'S FEES**

Because Plaintiff is not the prevailing party, Plaintiff's Motion for Attorney's Fees is **DENIED**.

## **CONCLUSION**

Plaintiff's Motion for Default Judgment and Motion for Attorney's Fees are DENIED.

Defendants shall have until and including May 23, 2011 to file an answer or other response to Plaintiff's complaint. The Clerk is directed to vacate the Entry of Default entered on November 16, 2010.

## **IT IS SO ORDERED.**

Date: April 8, 2011

  
H. R. T. Davis

Hon. Roger T. Benitez  
United States District Court Judge